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No. 86-538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANN HOCKERSMITH,

Petitioner,

vs.

FLYNT DISTRIBUTING COMPANY, INC.,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT FLYNT DISTRIBUTING COMPANY, INC. IN OPPOSITION TO PETITION

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PRELIMINARY STATEMENT

Respondent Flynt Distributing Company, Inc. ("FDC")[1] submits this brief in opposition to the apparent petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

The court below affirmed a judgment notwithstanding the verdict in an admitted public figure's invasion of privacy and false light

[1] FDC is a wholly-owned subsidiary of LFP, Inc. LFP, Inc. is also the corporate parent of Hustler Magazine, Inc. and Chic Magazine, Inc.

Neither Hustler Magazine, Inc. nor Chic Magazine, Inc. nor any of their officers were ever parties to this action.

action against the distributors of magazines that contained allegedly offensive material. The distributor defendants were FDC and Publishers Distributing Corp. ("PDC"), a now liquidated entity whose assets were acquired by FDC. The magazines were edited and published by third parties who did not appear at trial or before the court of appeals.[2]

There was no evidence at trial of actual malice on the part of either FDC or PDC. The petitioner Ann Hockersmith ("the plaintiff") has in fact admitted that no evidence was presented to the jury as to the distributors' knowledge or state of mind.

There are no special or important reasons that warrant review of the decision below. The decision below was on the basis of well-settled principles of libel and First Amendment law. The plaintiff does not, and could not, assert that the decision below conflicts with any decision by this Court or any other Court of Appeals.

The lack of significance of the decision below is evidenced by its issuance as an unpublished *per curiam* opinion.[3] Under former Fifth Circuit Rule 47.5, which was then in effect, the decision below has no precedential value.[4]

COUNTERSTATEMENT OF THE ISSUES

The petition raises the following issues:

1. Is the constitutionality of judgments notwithstanding the verdict and Rule 50(b) of the Federal Rules of Procedure settled?

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[2] These publishers were Partner Publishing Co. and Piccadilly Publication, Inc. The complaint named both publishers as defendants.

[3] The opinion below states:

> Local Rule 47.5 provides:
>
> "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal provisions".
>
> Pursuant to that Rule, the Court has determined that this opinion should not be published.

Petitioner's Appendix at 15.

[4] It should also be noted that, although she now does so in her petition, the plaintiff did not challenge the constitutionality of Rule 50(b) of the Federal Rules of Civil Procedure in the proceedings below.

2. Was the judgment notwithstanding the verdict in this case correct in light of the undisputed absence of evidence of actual malice on the part of the distributor defendants?

STATEMENT OF THE CASE

The facts of this case, the identity of the parties and proceedings below are summarized in the decisions of the Court of Appeals and the District Court. FDC and PDC would, however, supplement those summaries by pointing out the following:[5]

1. The plaintiff does not, and cannot, dispute her status as a public figure. She is a former Penthouse Magazine covergirl and "Pet of the Month" and has testified at trial that she aspired to become a celebrity. The plaintiff's brief below acknowledged that she was a public figure. *See* Appellant's Brief below at 15.

2. FDC is, and PDC was, in the business of distributing numerous magazines published by different publishers. FDC purchased the assets of PDC on March 17, 1980 and thereby assumed the responsibility of distributing magazines previously distributed by PDC. *See* Affidavit of Jim Kohls at ¶ 2.[6]

3. FDC does not in any way assist the publishers of the magazines it distributes in editing or preparing the content of those magazines. FDC also does not review or examine the magazines it distributes.[7] Kohls Aff. ¶¶ 11, 12.

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[5] In so doing, FDC and PDC will refer the Record filed with the Fifth Circuit on July 3, 1985 ("Record below") at the appropriate pages and to the trial transcript ("Tr.") at the appropriate pages.

[6] The February 3, 1982 affidavit of Jim Kohls (hereinafter cited to as "Kohls Aff." at the appropriate paragraph) appears at page 31 of the record below and was submitted in support of FDC's and PDC's motion to dismiss. The affidavit has never been contradicted.

[7] FDC does not even take physical control or possession of the magazines it distributes. The magazines are shipped directly from the publisher's shipping agent to local wholesalers who then sell the magazines to local retailers. Kohls Aff. 9.

Any review of the magazines it distributes would impose enormous financial burdens and logistical difficulties upon FDC. Kohls Aff. 11,12.

FDC distributes about 120 magazines a month. Prior to this action, these periodicals included the two magazines which contained the articles that are the subject of the plaintiff's complaint. Kohls Aff. ¶¶ 12, 3, 6.

4. At trial, the plaintiff failed to introduce any evidence as to FDC's or PDC's knowledge of the allegedly offensive magazine articles. The only live or recorded testimony that referred to the distributor defendants were statements by two witnesses that they did not know of either PDC or FDC.[8] *See* Tr. 74, 117-18.

5. At trial, the plaintiff's counsel twice admitted the lack of evidence as to PDC and FDC. The trial transcript shows that the first admission occurred when the plaintiff responded to the distributor defendants' motion for a directed verdict:

THE COURT:

> What evidence do you have to show they [*i.e.*, the distributors] knew what was in the magazine is what I mean?

MR. COBB:

> We have no evidence.

Tr. 203.

A second admission occurred during summation when counsel for the plaintiff further stated, "[t]here is no evidence what the distributing companies did." Tr. 235.

6. As noted in the opinion below, the plaintiff introduced a standard photographer's consent form at trial. *See* Appendix at 16. The form was signed by the plaintiff and waived any objection to the circulation or publication of nude and semi-nude photographs.[9] *See* Record below at 84, 89.

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[8] The only documentary evidence that referred to the distributor defendants in any way were the listings of FDC as distributor inside the allegedly offensive magazine issues. Record below at 207.

[9] The plaintiff asserted that the consent form had been amended in handwriting to restrict use of the photographs. The consent form introduced at trial however contained no such restriction. *See* Tr. 114-15; Record below at 84,89.

7. The distributor defendants moved for a directed verdict at the end of the plaintiff's case. Tr. 197. The district court denied that motion but permitted the distributor defendants to renew their motion. Tr. 207. FDC and PDC renewed the motion for a directed verdict when they moved for a judgment notwithstanding the verdict. Record below at 220.

ARGUMENT

I.

THE CONSTITUTIONALITY OF RULE 50(b) IS SETTLED

The plaintiff's attack on the constitutionality of judgments notwithstanding the verdict under Rule 50(b) is without merit. "[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial." *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321 (1967); *see also Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940).

The practice of reserving questions of law and taking a jury's verdict subject to a ruling on those questions "undoubtably was well established when the Seventh Amendment was adopted, and therefore must be regarded as part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that amendment." *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 660 (1935). In this case, the distributor defendants, in accordance with Rule 50(b), moved for a directed verdict before moving for a judgment notwithstanding the verdict. The district court reserved judgment on the earlier motion. *See* Fed. R. Civ. P. 50(b).[10] The judgment notwithstanding the verdict was consistent with the Seventh Amendment.

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[10] Rule 50(b) provides that "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion".

II.

THIS COURT'S DECISIONS REQUIRED THE PETITIONER TO INTRODUCE CLEAR AND CONVINCING PROOF OF ACTUAL MALICE

A. The plaintiff is, by her own admission, a public figure. *See* Appellant's brief below at 15. She was accordingly required to prove by clear and convincing evidence at trial that the distributors acted with actual malice. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Evidence of subjective awareness is required to show actual malice. As this Court pointed out in *St. Amant v. Thompson:*

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

390 U.S. 727, 731 (1968). The test of actual malice is not whether the distributors acted as reasonable distributors would in the same circumstances but rather what their actual state of mind was at the time of publication.[11]

B. The plaintiff failed to present any evidence as the distributor defendants' actual state of mind. There was no live or recorded testimony by anyone who knew of or was familiar with the distributor defendants. *See* Tr. generally.

Counsel for the plaintiff has acknowledged the lack of evidence of actual malice. At trial, the plaintiff's counsel advised the court below that he had no evidence of the distributor defendants'

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[11] It may be noted that actual malice is unlikely to exist where, as here, the defendants merely distributed material published by other persons. Distributors normally have no duty to monitor the materials they distribute for libelous conduct even where the plaintiff is a private figure. *See e.g.* W. Prosser & W. Keeton, The Law of Torts 810-11 (5th ed. 1984); *accord Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984), *cert. denied*, 105 S.Ct. 2114 (1985).

knowledge of the contents of the magazines. Tr. 203. That counsel further stated in his summation that there was no evidence as to what the distributor defendants did. Tr. 235.

C. The court below was not bound by the usual standards of deference to jury verdicts but was instead required to review the record independently. In *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1963-65 (1984), this Court held that First Amendment considerations prevent the usual deference accorded toward jury verdicts from applying to jury findings of actual malice. The *Bose* opinion explains the rationale for independent appellate review:

> The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . .
>
> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

104 S. Ct. at 1965. The *Bose* requirement of independent review of findings of actual malice further eliminates any doubt as the correctness of the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

The following constitutional provision and Federal Rule of Procedure were not set forth in the Petitioner's Appendix. They are accordingly stated here.

The First Amendment to
The United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Rule 50(b) of
The Federal Rules of Procedure

> *Motion for Judgment Notwithstanding the Verdict.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.